No. 96-2023

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EILEEN O'HARA,

Petitioner,

—against—

BAYLINER; BAYLINER MARINE CORPORATION d/b/a BAYLINER; BAYLINER MARINE CORPORATION; U.S. MARINE; U.S. MARINE CORPORATION d/b/a U.S. MARINE; U.S. MARINE CORPORATION; PERKO, INC.; PERKO MANUFACTURING CORP.; PERKINS MARINE LAMP & HARDWARE CORP.; BRUNSWICK MARINE COMPANY; FRANK TABONE; THOMAS TABONE; GUDZIKS MARINE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BAYLINER BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether New York State Court of Appeals correctly applied *Executive Jet* and its progeny in determining that federal maritime law governed products liability action which alleged that pleasure boat was defectively manufactured due to lack of nonskid material and handrail and cleat affixed to vessel was defectively designed and positioned when petitioner's injury occurred on navigable waters of the United States while disembarking the vessel?

Whether New York State Court of Appeals correctly applied 46 U.S.C. App. § 763a, enacted by Congress as the uniform national limitations period of three years for maritime torts, exclusive of state statutes thus rendering this action time barred?

PARTIES TO THE PROCEEDINGS

Brunswick Corporation owns the stock of Bayliner Marine Corporation. The Brunswick Corporation has a number of divisions and wholly owned subsidiaries and it is the only publicly owned corporation that is in any way related to the named Bayliner respondents.

The following defendants are not parties to this action: Frank Tabone; Thomas Tabone; and Gudziks Marine, Inc.

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 89 N.Y.2d 636, 679 N.E.2d 1049, 657 N.Y.S.2d 569 (1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

46 U.S.C. App. § 763a:

§ 763a. Limitations

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

STATEMENT OF THE CASE

Petitioner was allegedly injured on August 12, 1990 while disembarking from a boat anchored in the waters of Huntington Bay, a navigable water of the United States. Petitioner alleges that while disembarking from this vessel, she was injured by a cleat affixed to the vessel.

A. Petitioner repeatedly mischaracterizes the nature of this case

Petitioner attempts to recharacterize this maritime products liability action as a "typical State law slip and fall personal injury case". (Pet. 9) Petitioner filed suit against respondents, Bayliner, Bayliner Marine Corporation d/b/a Bayliner, Bayliner Marine Corporation, U.S. Marine, U.S. Marine Corporation d/b/a U.S. Marine, U.S. Marine Corporation, and Brunswick Marine Company[1] (hereinafter collectively referred to as "Bayliner") alleging that a cleat which was

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[1] Only two of the above named respondents are corporate entities: Bayliner Marine Corporation and U.S. Marine Corporation. The other above named respondents are either trade names or divisions without separate legal existence. Of the two properly named corporate entities, only Bayliner Marine Corporation actively conducts business; U.S. Marine Corporation is dormant and does not engage in any business activities.

affixed to the vessel was improperly designed and positioned and that the vessel was defectively manufactured because it was not equipped with nonskid material and a handrail. (App. 1a).

Moreover, petitioner's attempt to trivialize the maritime nature of this action by repeatedly referring to the alleged incident as a "slip and fall" conveniently ignores the plain language of the complaint. (Pet. *i*, 7, 9, 12, 13,) In paragraph 2 of its complaint, petitioner alleged that the vessel operator "anchored the Bayliner boat offshore in Huntington Bay for the purposes of disembarking" and that "[petitioner], in disembarking, was severely injured. . .". Notably, petitioner fails to give any reasons for the alleged "slip and fall".

B. Petitioner misrepresents the procedural history of this action

Petitioner discusses the procedural path of this action in exhaustive detail, including her first invalid attempt at commencing suit in Supreme Court of the State of New York, County of New York (hereinafter Supreme Court, New York County) which was a nullity. Petitioner fails to mention that she had three opportunities to timely commence an action and failed to do so. First, the initial action was automatically dismissed by operation of law when petitioner failed to comply with N.Y. C.P.L.R. § 306-b by filing proof of service within 120 days of filing the summons and complaint. Second, petitioner failed to take advantage of the extension provisions of N.Y. C.P.L.R. § 306-b(b), which allow commencement of a new action after the statute of limitations has expired. Furthermore, petitioner failed to invoke N.Y. C.P.L.R. § 205 which would have allowed her to commence an action within six months of the automatic dismissal.

This action was commenced on August 8, 1994, almost four years after the date of incident. (App. 19a) On September 9, 1994 Bayliner filed notice of removal to United States

District Court for Southern District of New York pursuant to 28 U.S.C. § 1441. (App. 16a) Removal was based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.[2] Thereafter, petitioner moved to remand the action and amend the complaint to add non-diverse parties.(App. 16a) The District Court found petitioner's motion to remand to be "without merit". However, the court allowed petitioner to amend the complaint to add non-diverse parties. As a result of the amendment, diversity was destroyed and action was remanded to Supreme Court, New York County[3] (App. 16a).

In response to petitioner's Amended Complaint, Bayliner moved to dismiss petitioner's action on the ground that petitioner's claims were governed by federal maritime law and were thus time-barred pursuant to the applicable three year statute of limitations period prescribed in 46 U.S.C. App. § 763a. (App. 1a, 13a).

By Decision and Order entered May 3, 1995, Supreme Court, New York County (Justice Goodman) determined that federal maritime law did not govern the action. As stated

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[2] As decided below, this case falls within the federal court's admiralty jurisdiction pursuant to 28 U.S.C. §1333 and is governed by federal maritime law. The removal jurisdiction of the federal courts pursuant to 28 U.S.C. §1441 cannot be based solely on admiralty jurisdiction or the application of federal maritime law to the action. *See, e.g. Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411 (S.D. Tex. 1993).

[3] The district court's removal jurisdiction could not be maintained solely because federal maritime law governs the case. *See, e.g., In re Dutile*, 935 F.2d 61 (5th Cir. 1991); *J.J. Ryan & Sons v. Continental Ins. Co.*, 369 F. Supp. 692 (D.S.C. 1974). Once diversity was destroyed, the District Court lacked jurisdiction to do anything other than remand the case to Supreme Court, New York County. U.S. District Judge Wood never addressed the merits of Bayliner's defense that the three year statute of limitations prescribed in 46 U.S.C. App. § 763a bars the action. In fact, Justice Goodman of Supreme Court, New York County stated in her May 3, 1995 order that the case was remanded to her court due to the addition of non-diverse plaintiffs. (App. 16a).

by the New York State Court of Appeals (Associate Judge Bellacosa):

> [T]he New York State Supreme Court applied an overly narrow test for resolving the threshold question. It reasoned that '[petitioner] was injured on a pleasure boat, that is a craft having no relationship to the traditional and most significant concern of admiralty jurisdiction-the protection of those engaged in commerce'. Additionally, the nisi prius court noted that 'while Huntington Bay may constitute navigable waters, the boat was at rest very close to the shore, and the individuals on board were using it for purely recreational purposes.'

(App. 2a).

On February 26, 1996 the Supreme Court of New York, Appellate Division, First Department affirmed the lower court's order without opinion. Associate Justice Wallach filed a separate opinion wherein he urged the application of federal maritime law to the within action. (App. 13a).

On March 25, 1997, the New York State Court of Appeals (hereinafter Court of Appeals) unanimously reversed the lower courts and granted Bayliner's motion to dismiss the complaint, as barred by 46 U.S.C. App. § 763a. In so deciding, the Court of Appeals reviewed this Court's "precedents and principles" and applied the jurisdictional test set forth in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and modified by its progeny. (App. 2a) The court held that the "plain reading and application of these. . . . precedents leads to the inescapable conclusion that Federal admiralty jurisdiction governs the instant controversy." (App. 6a).

ARGUMENT

I.

PETITIONER'S BARE ASSERTION THAT FEDERAL MARITIME LAW DOES NOT APPLY TO THIS ACTION BECAUSE IT INVOLVES A PLEASURE BOAT ENGAGED IN NON-COMMERCIAL, NON-NAVIGATIONAL ACTIVITY IS CLEARLY ERRONEOUS AND IGNORES THIS COURT'S DECISIONS IN *FOREMOST, SISSON AND GRUBART*

Petitioner's claim that applying federal maritime law to this action involving a pleasure boat in non-commercial, non-navigational activity extends the reach of *Executive Jet* ignores this Court's subsequent decisions in *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982), *Sisson v. Ruby,* 497 U.S. 358 (1990) and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) which refined the jurisdictional test.

In *Foremost*, a case involving a collision between two pleasure crafts, this Court held that admiralty law should be applied to commercial and noncommercial vessels alike:

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct.

457 U.S. 674-675. Petitioner conveniently overlooks this language in erroneously stating that the "need for uniformity is not of preeminent importance, particularly with respect to aquatic recreational activities or other non-maritime commerce activity". (Pet. 10).

Moreover, in *Sisson*, this Court foreclosed the view that *Foremost* was intended to limit federal maritime jurisdiction in pleasure craft cases to only those involving navigation of vessels. *Bender's Recreational Boating Law* § 1.03[C] (C. Peter Theut ed. 1994) This Court upheld admiralty jurisdiction when a fire erupted on a pleasure boat due to a defective washer/dryer unit on board the yacht while it was docked at a marina. Therefore, petitioner's statement that "[a] case that involves a recreational boat is likely not within admiralty unless navigational activity and/or maritime commerce is involved" (Pet. 8) is without merit and stands in stark contrast to *Sisson v. Ruby*.

This Court's latest pronouncement regarding admiralty jurisdiction in *Grubart* stressed that overgeneralizing the alleged tort to eliminate a maritime connection would be a mistake and would "convert *Sisson* into a vehicle for eliminating admiralty jurisdiction". 115 S. Ct. at 1052, 130 L. Ed. 2d at 1040. This Court stated that "although . . . [*Foremost and Sisson*] do not say that every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction no matter what, they do show that ordinarily that will be so". *Grubart*, 115 S. Ct. at 1053, 130 L. Ed. 2d at 1041.

In erroneosly asserting that federal maritime law does not apply to this action, petitioner relies upon the following distinguishable cases: *Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987) *cert. denied* 484 U.S. 1027 (1988) (pleasure boat passenger injured in diving accident); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993) (houseboat guest injured when dove off boat and struck object under water); *Smith v. Knowles*, 642 F. Supp. 1137 (D. Md. 1986) (pleasure boat passenger jumped overboard to urinate); *Madderns v. Fox Film Corp.*, 205 A.D. 791, 200 N.Y.S. 344 (3d Dep't 1923), *aff'd* 237 N.Y. 614 (1924) (motion picture actor being chased along edge of boat, tripped and fell into water).

The Court of Appeals was not persuaded by petitioner's attempts to mischaracterize the nature of this action as a swimming or diving accident or as a slip and fall. It was similarly unpersuaded by petitioner's erroneous assertions that this case does not involve any maritime concerns. Instead, the Court of Appeals held this incident was substantially related to traditional maritime activity because it involved the operation of a vessel on navigable waters. (App. 8a) Moreover, the plain language of the complaint asserts that petitioner was injured while disembarking from the vessel, also traditional maritime activity. *White v. United States*, 53 F.3d 43 (4th Cir. 1995); *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988). *See also Butler v. American Trawler Co. Inc.*, 887 F.2d 20, 21 (1st Cir. 1989) ("[T]he boarding of a ship bears a significant relation to traditional maritime activities . . . one does not normally board a ship in quite the same way one enters a building, an airplane or a car.") Finally, petitioner surprisingly fails to mention that she was injured on a cleat, a unique and traditional piece of marine hardware.

Petitioner's assertion that "the cases involving navigating vessels and maritime commerce cited to by the Court of Appeals and by [Bayliner] are not applicable to the case at bar" strains credulity. (Pet. 9) According to petitioner's reasoning, this Court erroneously cited to *Foremost* in deciding *Sisson*.

The petition claims as a general matter that federal maritime law does not apply to product liability claims "involving boats on navigable waters not engaged in maritime commerce or navigation". (Pet. 8) The cases cited by petitioner in reliance upon this erroneous proposition are easily distinguishable from the case at bar. *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996) (nexus test not met when passengers of houseboat tied to shore of a lake injured by emission of carbon monoxide fumes inside sleeping area, no potential to disrupt maritime commerce

because fumes would not be dangerous if they escaped); *Allen v. Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) (admiralty jurisdiction not discussed, passenger fell overboard); *Hutt v. Gibson Fiber Glass Products, Inc.*, 914 F.2d 790 (6th Cir. 1990) (admiralty jurisdiction not discussed, decedent electrocuted while swimming near houseboat); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740 (2d Cir. 1984) (admiralty jurisdiction not discussed, incident occurred on non-navigable waters of Lake George, New York); *Stanley v. Bertram-Trojan, Inc.*, 855 F. Supp. 657 (S.D.N.Y. 1994) (admiralty jurisdiction not discussed, sole issue in case deals with Federal Boat Safety Act); *Seymour v. Brunswick Bowling & Billards Corp.*, 655 So.2d 892 (Miss. 1995) (admiralty jurisdiction not discussed, involved accident on lake); *Moore v. Brunswick Corporation*, 889 S.W. 2d 246 (Tex. 1994), *cert. denied, Vivian Indus. Plastics, Inc. v. Moore*, 513 U.S. 1057 (1994) (admiralty jurisdiction not discussed, sole issue in case deals with Federal Boat Safety Act); *Woltering v. Outboard Marine Corp.*, 615 N.E.2d 86 (Ill. App. Ct. 1993) *cert. denied*, 513 U.S. 1198 (1995) (nexus test not met when pleasure boat passenger thrown overboard and injured by propeller).

Notably, petitioner fails to mention *East River S. S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), wherein this Court unanimously held that a products liability action which meets the jurisdictional test is governed by federal maritime law. As set forth in Point II, *infra*, this case meets the two pronged jurisdictional test and therefore warrants application of admiralty law.

II.

THE NEW YORK COURT OF APPEALS CORRECTLY APPLIED THE JURISDICTIONAL TEST SET FORTH IN *EXECUTIVE JET* AND REFINED BY ITS PROGENY

Petitioner's assertion that the Court of Appeals decision "vitiates [this Court's] precedents and principles with respect to federal maritime law" and retreats to the historical bright line strict locality rule is patently erroneous. (Pet. 6) The Court of Appeals decision was a correct application of the seminal cases decided by this Court which set forth the two pronged test for admiralty jurisdiction.

A. Situs Test

It is not disputed that Huntington Bay is a navigable water of the United States and satisfies the situs test or first prong of the jurisdictional analysis under *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), *Sisson v. Ruby*, 497 U.S. 358 (1990), and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). Petitioner unavailingly attempts to cast doubt upon the holding by repeatedly stressing that the vessel was located in shallow navigable waters fifteen feet from the beach. (Pet. 2,7,9) It is well settled that maritime jurisdiction encompasses all waters within the ebb and flow of the tide, *Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022 (4th Cir. 1986), *cert. denied Coast Catamaran Corp. v. Hassinger*, 478 U.S. 1004 (1986) and that depth of the water is irrelevant to the analysis. *See e.g., Price v. Price*, 929 F.2d 131 (4th Cir. 1991) (situs test met where accident occurred when boat was being beached).

B. Nexus Test

The first inquiry of the two-step nexus test requires an assessment of the general features of the alleged incident and a determination whether it had potential to disrupt maritime commerce. *Sisson*, 497 U.S. at 363, *Grubart*, 115 S. Ct. at 1043, 130 L. Ed. 2d at 1038. The Court of Appeals examined the general features of this incident, placing a defective vessel in navigable water, and stated that it could create "a hazardous situation to nearby vessels and all those engaged in maritime activity". (App. 7a). Contrary to petitioner's assertion no court has characterized the general feature of this incident as "protecting sailors engaged in maritime activity from defective equipment". (Pet. 11) Moreover, the Court of Appeals noted "the existence of a dangerous and, possibly, injurious situations 'could lead to restrictions on the navigational use of the waterway'. " (App. 7a) *quoting Grubart*, 115 S. Ct. at 1050-1051. 130 L. Ed. 2d at 1038. The court stated "potentiality is plainly operative under the facts of this case" and held that "this case qualifies as potentially disruptive of maritime commerce". (App 7a, 8a).

Petitioner asks this court to modify the potentiality aspect of this inquiry and focus on the incident "[a]s it actually happened".(Pet. 12) The petition criticizes *Complaint of Bird*, 794 F. Supp. 575, 579 (D.S.C. 1992), wherein the court examined the general features of the alleged accident not in the shallow water where it occurred, but in a busy maritime thoroughfare. Petitioner glaringly omits to mention that *Complaint of Bird* relied in part on *Foremost* wherein two pleasure boats collided in an area which was "seldom, if ever used for commercial traffic", 457 U.S. at 670, n. 2., and this Court examined the potential impact on maritime commerce as if the collision occurred at the mouth of the St. Lawrence Seaway. 457 U.S. at 675.

Petitioner's incident occurred on the navigable waters of Huntington Bay which flows into Long Island Sound, a body

of water which borders the States of New York and Connecticut and which flows into the Atlantic Ocean at its eastern terminus. In this case, if emergency personnel, Suffolk County marine police, Coast Guard and other rescuers had been called to the scene, undoubtedly it could have impacted maritime commerce. Indeed, had the accident occurred at the entrance to Huntington Bay, rescue efforts could have blocked the use of the channel for the numerous vessels (both commercial and pleasure) which ply Huntington Bay. Had the accident occurred at Town Dock, rescue efforts could have interfered with the other vessel traffic in the area.

Certainly, the Court of Appeals holding that placing a defectively designed vessel in the navigable waters of the United States has the potential to disrupt maritime commerce fits squarely within the parameters set forth in *Sisson* and *Grubart* and cannot be disputed.

The second prong of the nexus test requires a court to determine if the "general conduct from which the incident arose" bears a substantial relationship to traditional maritime activity. *Sisson*, 497 U.S. at 364. Petitioner however, attempts to redefine this second step as requiring a "sufficient connection to maritime commerce" to suit her own purposes. (Pet. 12) The maritime connection is much broader than petitioner asserts, "there is no requirement that 'the maritime activity be an exclusively commercial one' " *Foremost,* 457 U.S. 674 *quoting Richardson v. Foremost Insurance Co,* 641 F.2d 314, 316 (5th Cir. 1981). A court must ask "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case.." *Grubart*, 115 S. Ct. at 1051, 130 L. Ed. 2d at 1038. Activities such as the navigation of a vessel in navigable waters, *Foremost*, 457 U.S. at 674, the "storage and maintenance of a boat at a marina on navigable waters", *Sisson*, 497 U.S. at 365, and "repair or maintenance work on a navigable waterway performed from

a vessel", *Grubart*, 115 S. Ct. at 1051, 130 L. Ed. 2d at 1039, satisfy the substantial connection test.

The Court of Appeals holding that this incident which involved the "operation of boats in navigable water" (App. 8a) satisfies the substantial connection test is in accord with the well established law promulgated by this Court. *See also Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 n.4 (1st Cir. 1988) (injury incurred while disembarking from a cruise ship possessed the requisite nexus to traditional maritime activity); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) (passenger on pleasure boat injured while operator attempted to beach the vessel to disembark passengers satisfied the substantial relationship to traditional maritime activity inquiry).

III.

THE NEW YORK COURT OF APPEALS CORRECTLY APPLIED 46 U.S.C. App. § 763a, THE UNIFORM NATIONAL LIMITATIONS PERIOD OF THREE YEARS FOR MARITIME TORTS, EXCLUSIVE OF ANY STATE STATUTES THUS RENDERING THIS ACTION TIME BARRED

Congress expressly enacted 46 U.S.C. App. § 763a to create a "uniform national statute of limitations for maritime torts". *See* H.R. Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Code Cong. & Admin. News 3303. The legislative history reveals that Congress "sought to eliminate forum shopping and the presentation of stale claims which can result when claimants seek to bring their suit in the jurisdiction having the most advantageous procedural rules." *Ford v. Atkinson Dredging Company*, 222 Ga. App. 593, 474 S.E.2d 652 (Ga. Ct. App. 1996) (*citations omitted)*. Therefore, 46 U.S.C.App. § 763a ensures that maritime tort cases will receive uniform treatment whether brought in federal or state

court pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333.[4]

Petitioner mistakenly relies on the prefatory language of 46 U.S.C. App. § 763a, "[u]nless otherwise specified by law" in stating that the New York statute of limitations contained in N.Y. C.P.L.R. § 214 and the New York infancy tolling provision contained in N.Y. C.P.L.R. § 208 apply to this action. This argument disregards the Supremacy Clause of the United States Constitution pursuant to which federal law preempts state law in three situations, two of which exist in this case: 1) Express Preemption- when Congress expressly states the extent to which federal law preempts state law and 2) Implied Conflict Preemption- when federal and state law directly conflict and it is impossible to comply with both provisions. *See generally, Scheidewind v. ANR Pipeline*, 485 U.S. 293, 299-300 (1988). *See also Lewis v. Brunswick Corporation*, 1997 A.M.C. 1921 (11th Cir. 1997) A state law is impliedly preempted when it "conflicts with the 'accomplishment and execution of the full purposes and objectives of Congress' ". *Lewis*, 1997 A.M.C. at 1929 *quoting Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995). As set forth above, the express purpose of enacting § 763a was to provide for a uniform national statute of limitations for maritime tort actions. Allowing litigants to avail themselves of a particular state's limitation period by shopping for a "friendly" state court instead of federal court would frustrate Congress' intent to preclude forum shopping and promote uniformity. Furthermore, the application of any state statute of limitation directly conflicts with § 763a because compliance with two limitations periods is impossible. Therefore, § 763a preempts the New York State statute of limitations period.

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[4] Petitioner's unsupported assertion that § 763a was not meant to apply to state law claims is absolutely without merit and completely disregards the "saving to suitors" clause contained in 28 U.S.C. § 1333.

Petitioner's argument that there is a presumption against preemption by federal maritime law is a red herring. This Court has clearly pronounced that a maritime tort is a "type of action which the Constitution has placed under national power to control in 'its substantive as well as procedural features' ". *Pope & Talbot v. Hawn*, 346 U.S. 406, 409 (1953) *quoting Panama R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

Petitioner's argument that this Court should not apply § 763a because the annotations to the statute do not contain a case identical to this case is frivolous. Annotations are merely a sample of cases and not an exhaustive list of cases which deal with a particular statute. The assertion also stands in stark contrast to federal and state court opinions which have determined that Congress intended § 763a to preclude the application of state statute of limitations with respect to maritime tort actions brought by pleasure craft passengers. *See Mink v. Genmar Industries Inc.*, 29 F.3d 1543 (11th Cir. 1994) (action by pleasure craft passenger brought almost four years after the date of the accident held time barred by § 763a); *Konrad v. South Carolina Elec. and Gas Co.*, 308 S.C. 167, 417 S.E.2d 557 (S.C. 1992) (personal injury action brought by sailboat passenger governed by § 763a, thereby barring action brought nearly six years after date of incident); *See also Butler v. American Trawler Co. Inc.*, 887 F.2d 20 (1st Cir. 1989) (personal injury action brought by passenger three and one-half years after the date of accident subject to § 763a and time barred); *Brown v. Outboard Marine Corp.*, 1995 A.M.C. 2792 (E.D. Mich. 1995) (action by minor injured while trying to board pleasure craft after "tubing" held subject to admiralty jurisdiction and time barred pursuant to § 763a because action was commenced after expiration of three year limitation period).

Alternatively, the "reverse-*Erie*" doctrine mandates that § 763a be applied in maritime tort cases pending in state courts. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986). *See also Ghotra v. Bandila Shipping, Inc.*, 1997

A.M.C. 1936, 1940 (9th Cir. 1997) Pursuant to the "Savings to Suitors" clause of 28 U.S.C. § 1333, both federal and state courts have concurrent original jurisdiction over admiralty and maritime cases. *American Dredging Co. v. Miller* 510 U.S. 443 (1994). However, state courts in maritime cases must apply federal law "to secure a single and uniform body of maritime law". *Lerner v. Karageorgis Lines*, 66 N.Y.2d 479, 484-485, 497 N.Y.S.2d 894, 895, 488 N.E.2d 824 (1985) *quoting In re J. Ludwig Mowinckles Rederi.*, 25 N.Y.2d 576, 581, 307 N.Y.S. 2d 660, 663, 255 N.E.2d 74 (1970) *cert. denied* 398 U.S. 939 (1970). A state court may not apply any state remedy which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations". *American Dredging*, 510 U.S. at 447 *quoting Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). Therefore, a state court may not limit a party's substantive rights nor apply its own procedural rules if they would "significantly affect the result of the litigation, i.e., would be outcome determinative". *In re Rederi*, 307 N.Y.S.2d at 663. Accordingly, the federal statute of limitations contained in § 763a applies to a maritime tort case pending in state court.

The circumstances in which state law may supplement federal maritime law are very limited. In this Court's most recent pronouncement, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), a state wrongful death statute supplied a remedy not recognized under the general maritime law. However, in explaining the difference between the extent to which general maritime law and federal statutes may be supplemented by state law, this Court stated "when Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is . . . no cause for enlargement of the damages statutorily provided." 116 S. Ct. at 631, 133 L. Ed. 2d at 591-592. Congress enacted 46 U.S.C.App. § 763a to govern all maritime torts and did not provide for supplementation by state law.

The provisions of 46 U.S.C. App. § 763a contain no exceptions or tolling provisions. Had Congress intended to provide a tolling provision, it could have enacted one. *See, e.g.*, 46 U.S.C. § 183b (c); 46 U.S.C. § 763 (the predecessor statute to 46 U.S.C. App. § 763a). Where Congress creates a limitation period without a tolling provision, the limitation period is conclusive. *See, e.g., Herget v. Central Nat. Bank & Trust Co. of Peoria,* 324 U.S. 4, 7-8 (1945) (refusing to extend a limitation period of the Bankruptcy Act).

The application of the New York tolling provision would directly affect the outcome of this case by extending the time for plaintiff to commence suit. This result would undermine the explicit Congressional intent in enacting 46 U.S.C. App. § 763a, i.e., the establishment of a uniform limitations period for all maritime tort actions seeking recovery for personal injury. *See Landreth v. United States,* 850 F.2d 532 (9th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) (state infancy tolling provisions could not be invoked to extend plaintiff's time to sue under Federal Tort Claim Act); *Smith v. H.B. Allsup & Sons Inc.*, 718 F. Supp. 21, 22 (S.D. Miss. 1989) (state infancy tolling provisions could not extend plaintiff's time to sue under Fair Labor Standards Act); *Hall v. E.I. Du Pont De Nemours & Co.*, 312 F. Supp. 358, 360-361 (E.D.N.Y. 1970) (collecting cases in support of holding that court could not create an infancy toll for personal injury governed by statute of limitations contained in Clayton Act); *Sgambati v. United States,* 172 F.2d 297 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949) (time to commence action under Suits in Admiralty Act and Public Vessels Act not extended by plaintiff's infancy). The conspicuous absence of a tolling provision in 46 U.S.C. App. § 763a makes plaintiff's age at the accrual date irrelevant to the determination that the action is time-barred.

Moreover, as set forth above, a state court cannot apply its own procedural rules if such rules would determine the outcome of the litigation. *In re Redieri,* 307 N.Y.S.2d at 663. In

this case, applying N.Y. C.P.L.R. § 208 would save an otherwise untimely action.

State courts have pronounced that their respective state tolling provisions cannot supplement § 763a to salvage a maritime tort action brought by a minor more than three years after the date of incident. In *Ford v. Atkinson Dredging Co.*, 222 Ga. App. 593, 474 S.E.2d 652 (Ga. Ct. App. 1996), minor plaintiff was injured when pleasure boat on which she was a passenger collided with barge. Plaintiff instituted suit more than three years after the incident. The court rejected plaintiff's argument that her minority tolled the statute of limitations. The court held the Georgia infancy tolling statute inapplicable because the claim arose under general maritime law, 46 U.S.C. App. § 763a. *See also, Johnston v. Water Streeker Inc., et. al.*, No. BCV 01369 (Super. Ct., San Bernardino County, CA, filed October 10, 1996) (maritime tort case instituted more than three years after date of alleged incident, court held "[A]lthough plaintiff was a minor at the time of the accident, section 763a provides no tolling provision to account for his minority. Consequently, his action is time-barred").

Thus, the Court of Appeals was correct in applying 46 U.S.C. App. § 763a to the exclusion of N.Y. C.P.L.R. § 208 and § 214 and petitioner's action is time barred.

CONCLUSION

For the reasons stated above, it is respectfully submitted that petition for a writ of certiorari should be denied.

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Respectfully submitted,

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